BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE JUDGE DAVID I. GOLDMAN

A.S.V. INC. A/K/A TEREX, Employer, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO, Petitioner.	Case No. 18-RC-128308
A.S.V. INC. A/K/A TEREX, Respondent, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO, Charging Party.	Case Nos. 18-CA-131987 18-CA-140338

CHARGING PARTY INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO'S POST-HEARING BRIEF

Dated: January 30, 2015

Jason R. McClitis
Blake & Uhlig, P.A.
753 State Avenue
475 New Brotherhood Building
Kansas City, Kansas 66101
Telephone: (913) 321-8884
jrm@blake-uhlig.com

Counsel for Charging Party International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO (hereinafter, the "Union")

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The evidentiary hearing in this matter was held in Grand Rapids, Minnesota on November 18-21, 2014[1] and December 9-12. The governing pleadings at the outset of the hearing were the *Amended Complaint and Notice of Hearing* issued on October 16 that was subsequently amended by the *Order Further Consolidating Cases and Amendment to Amended Complaint* issued on November 6, and the *Report on Objections, Order Directing Hearing on Objections and Order Consolidating Cases* issued on October 8. (GC 1(o), (s), (z)).

STATEMENT OF FACTS

A. Respondent's Operations in Grand Rapids, Minnesota

The Respondent, A.S.V., Inc., a/k/a Terex (hereinafter, "Respondent") has a facility in Grand Rapids, Minnesota (hereinafter, the "Grand Rapids facility"). Construction equipment is manufactured at the Grand Rapids facility, including its primary products, compact tract loaders ("CTLs") and skid steer loaders ("SSLs"). (Tr. 57). The CTLs and SSLs are maneuverable machines used by a variety of owners including landscapers, construction companies, and scrap yards (Tr. 64-56). The difference between the two machines is the CTLs are track machines and the SSLs are wheeled machines. (Tr. 57). The Grand Rapids facility also manufactures undercarriages which are used on the CTLs and also manufactured and sold to Caterpillar. (Tr. 57, 65-66; GC 5).

Products manufactured at the Grand Rapids facility are not sold by Respondent, but rather by an affiliated entity known as Terex Construction Americas ("TCA"). TCA is a centralized sales organization for Respondent. TCA generates sales and Respondent ships the product to the customers based on those sales. Practically all of Respondent's sales are actually

[1] All dates herein are the year 2014 unless specifically noted otherwise.

to TCA. Once a sale is completed and the product is manufactured, Respondent transfers the product to TCA's inventory. (Tr. 66-68, 73, 97).

Pertinent individuals, among others, that are part of management and supervision at the Grand Rapids facility are:

- Jim DiBiagio, General Manager
- Deborah Schultz, Senior Human Resources Manager
- Joan Hoeschen, Area Manager, Welding, Fabrication and Paint
- Lori Gill, Purchasing Manager
- Bill Wake, Director, Engineering and Development
- Nancy Dahlgren, Shipping, Receiving and Warehouse
- Buck Storlie, Test Track and Development Supervisor

(GC 1(s), (w), ¶ 4).

B. Pre-Petition Employee Union Activity

Employees of Respondent at the Grand Rapids facility contacted the Union in January 2014 seeking representation. (Tr. 467, 521). Union meetings were held thereafter with employees and suggestions were made during the early union meetings to attempt to organize the facility department-by-department. (Tr. 469-70, 493, 928-29). The first meeting was held on or about February 27 and the Union and employee supporters proceeded with solicitation of the authorization cards from employees throughout the facility. (Tr. 467). Ultimately, the Union decided in March or April that it would attempt to organize the paint and undercarriage departments separately, under *Specialty Healthcare*. (Tr. 493).

With respect to the paint department, cards were specifically solicited from paint department employees starting during the first two weeks of March by paint employee Lee Kostal. (Tr. 1009). After receiving considerable support in the paint department, Mr. Kostal approached paint employee Mitchel Johnson in April or May and asked him to come on board

with the Union because he wanted an "eleven-and-zero vote to send a clear message to the [Respondent] that we were all in unison together as one." (Tr. 827).

In addition to soliciting authorization cards, subsequent Union activity occurred prior to the filing of representation petitions. The Union hand-billed at Respondent's facility on April 7. (Tr. 513; GC 48(a)). The Union also sent out a flyer and held a meeting on or about May 5. (GC 47(a)).

C. April 16 All-Hands Meeting

General Manager DiBiagio held a mandatory "all hands" meeting[2] with employees on April 16. (GC 7; Tr. 93). During this meeting, DiBiagio covered a number of topics with employees, including the fact that he "hear[d] that there's some folks that are very interested in bringing a bargaining unit into this facility." (GC 53(a), p. 29). DiBiagio also spoke about Respondent's recent run of profits and Respondent's plan to hire more people:

- "[W]e had a profitable first quarter of seven straight months of profitability." (GC 53(a), p. 4).
- "After that, April looks like it's shaping up to be a pretty strong month. We ought to beat March's performance in terms of profitability." (GC 53(a), p. 8)
- "Overall, the plant will get bigger and we'll be hiring more people." (GC 53(a), p. 13).

He also assured the employees their jobs were safe, even though Respondent was apparently looking to "farm .. out" work away from welding and paint and insource other work to compensate:

- "We're going with quick attach and we brought in another quick attach in, right? That kind of thing, so we're looking at bringing more of the small parts in and stuff that we can turn real easy, real quick that we can do a really good job at.

[2] Respondent's mandatory "all hands" or "town hall" meetings are held on, approximately, a monthly basis and during the meeting, Respondent shuts down its departments and production lines to ensure employees attend. (Tr. 87-89).

Then the stuff that we know we're gonna be constrained and will be real major obstacles to us down the road, let's farm that out so that we can grow this business and do it in a way that we can be very successful. So, don't be worried about running out of work." (GC 53(a), p. 13)

- "Insourcing CNC work, we have CNC work that's outside right now that we could run in here. We've got two machines. We could get better machines, to buy a better machine for this tool. We gotta do what makes sense. We'll probably start bringing more of that in there. I know we're already looking at that and painting." (GC 53(a), p. 13-14)

In fact, DiBiagio assured employees in welding and paint that they were not in danger of losing their jobs and refuted any notion that they would be shutting down paint:

- "It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doing that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay?" GC 53(a), p. 12).

DiBiagio also refuted any issue with what appeared to be a decline in SSL orders, referring to it as "no big deal," and stated "it doesn't matter" whether the work needed is for CTLs and SSLs:

- "With the skid steers, it's like Takeuchi is not moving them. We're not moving them. Out there in the field is not moving at all. Really, we're (unintelligible) . . . for the most part. That's why we're thinking about getting CE and going over there right now. It's no big deal. Personally, if we make a tractor machine or skid steer it doesn't matter, as long as we've got enough to go around to everybody. (GC 53(a), p. 28).

D. The Representation Petitions

On May 9, the Union filed two election petitions to represent employees in two different departments — the Paint Department and the Undercarriage Department. (GC 3-4). Prior to filing the Petitions, the Union had the support of 10 of 11 employees in the Paint Department and 11 of 16 employees in the Undercarriage Department. (Tr. 493-94).

1. Paint Petition

In response to the Paint Department Petition, the Employer entered into a stipulated election agreement on May 20, 2014. (Case No. 18-RC-128325). The Paint Election was then scheduled for June 18. (GC 3).

2. Undercarriage Petition & Resulting Assembly Unit

In response to the Undercarriage Department Petition, Respondent refused to enter into a stipulation and a pre-election hearing was held on May 20, 2014. (Case No. 18-RC-128308). Among others, Lee Kostal attended this hearing as a prospective witness. (Tr. 456).

On May 29, Regional Director Marlin O. Osthus (hereinafter, the "Regional Director") issued a Decision and Direction of Election (hereinafter, the "Decision"). (GC 1(m)). In the Decision, the Regional Director rejected the petitioned-for Undercarriage Department unit and directed an election on a larger group — an Assembly Unit. The Decision increased the number of eligible voting employees to 41 employees at the time of the Assembly Election. (GC 4(d)).

The Union thereafter reviewed the Decision, decided to proceed to an election on the Assembly Unit, and submitted a total of 26 authorization cards that demonstrated the Union's majority support as of June 2. After submitting a sufficient showing of interest, the Region set the Assembly Election for June 25. (GC 4).

E. June 10 All-Hands Meeting

General Manager DiBiagio also held a mandatory meeting with employees on or about June 10. (Tr. 108-09; GC 53(b)). During this meeting, DiBiagio covered a number of topics with employees. DiBiagio discussed Respondent's continued run of profits:

- "Our operating profit, we had another month in the black. We made 111,000…." (GC 53(b), p. 1-2).

DiBiagio also announced that the operating profit was diminished because Respondent spent money and had legal costs associated with the union campaign:

- "Another thing impacting that is that nothing is free. Nothing comes cheap. This isn't a bash, but I just want to share all the facts with you. The union campaign has probably cost us almost $100,000 already. We've got 50 that came out of this, so we would have been at about $160,000 and it's probably going to be somewhere between $50-75,000 again in June, which is in that number." (GC 53(b), p. 2-3)

- "So I mentioned, whatever comes out, whatever goes up, something else has to go down. These are all cut from the same pie. If you cut one piece bigger, then next piece is gonna be smaller. It's like squeezing a balloon. The same amount of air in it, if you squeeze it, one side is gonna be bigger, one side is gonna be smaller. The total there's an issue. So now, I gotta figure out how we're gonna offset the cost of going through this process. I've already got $150,000 I've got to come up with now to pay for legal costs." (GC 53(b), p. 20).

DiBiagio also suggested that Respondent's legal costs were "not to fight anything" associated with the union campaign. (GC 53(b), p. 3). Also, during this meeting, DiBiagio referenced a downturn as merely "business cycle":

- We've lost $36 million in the last couple of years and we just barely got ourselves in the profitability side. Now our volume's down low enough we're gonna lose money here for the next couple of months. Okay, well that's just a business cycle. We gotta work through it. At the end of the day, hopefully at the end of year we'll still be positive again. (p.22)

Similarly, DiBiagio noted that "[b]usiness ebbs and flows," that there has not been a layoff during the time DiBiagio has been at Grand Rapids, and "[w]e'll get through this." (GC 53(b), p. 29, 31).

In the slides during this meeting, DiBiagio identified the Union as a "third party" that "will not help." (GC 9; Tr. 140) In fact, DiBiagio testified at the hearing in this matter that, throughout the time that the Union was organizing, he would consistently refer to the Union as a "third party." (Tr. 141; *see also* Tr. 763-64).

E. The Paint Election (June 18)

On June 18, the Paint Election was held and the Union succeeded by obtaining 91% of the vote (10 of 11 employees). Lee Kostal served as the Union's observer while Mitchel Johnson served as Respondent's observer. (Tr. 127, 433, 454, 824). Prior to the election, multiple paint employees wore union shirts. (Tr. 718).

The Union was formally certified as the exclusive bargaining representative for the Paint Unit on June 25. (GC 3).

F. The DiBiagio "Meltdown" (June 19)

The day after the Paint employees selected the Union to be its representative, DiBiagio called a mandatory meeting with the Assembly employees – only six (6) days before the June 25 election. This meeting was an impromptu, mandatory meeting, without prior notice that took place hours after the victory in the paint election. (Tr. 114, 559).

DiBiagio's statements during this meeting are largely undisputed. DiBiagio admitted that the content of the GC 11 was read to the assembly employees during such meeting. (Tr. 114). DiBiagio opened the meeting by stating he had stayed up late the previous night completing a written statement. (Tr. 119; GC 11.)

Before turning to the actual statements, it is important to note how DiBiagio's demeanor and tone were described during this meeting the day after Paint employees selected the Union: (1) "Really red in the face, like pretty much thought he was having a heart attack. His eyes were popping out of his head and he was really getting agitated to me, and ready to explode." (Tr. 628); (2) "Angry…. cussing and swearing…. Loud" (Tr. 559); (3) "Aggressive…. loud and pacing back and forth." (Tr. 992).

Given that context, DiBiagio made the following statements of unspecified reprisals directly towards the paint department in an aggressive and loud manner (GC 11):

- "Yesterday the paint department voted 10-1in favor of the union. They are claiming a great victory but I am not so sure they will be happy down the road with the decision they made."
- "I think the painters made a huge mistake yesterday. Time will tell but I think they made a big mistake."
- The painters did not win "because now have taken a huge risk with their decision to be represented by the union."

Also during the June 19, 2014 meeting DiBiagio made the following statements of unspecified reprisals directly towards any union supporter in an aggressive and loud manner (GC 11):

- "If I can't trust you, you are nothing to me;"
- "The message received is… You don't believe a thing I have been telling you and you don't give a shit about anything I have done for you."
- "…here we go pulling a dumbass move like bringing in a union"
- "Orders are plummeting, we are going to go through a rough time over the next several months and instead of pulling together to weather the storm you decide to bring in a union? Unfuckin believable."
- "Don't you see what is going on right here right now? Who in their right minds does this kind of crap anymore and expects to succeed?"
- "…it really pisses me off when I see the audacity in this room after all the company has done for you."
- "By doing all of this union crap you've thrown us back almost all the way to square one."
- "those of you who think bringing in a union is a good idea need a reality check."

Unlike his typical protocol at team meetings, DiBiagio was profane throughout the meeting and did not take questions after he completed reading GC 11. (Tr. 114, 119).

G. Ellis Meetings (June 23)

Approximately four days after the June 19 meeting, a mandatory meeting of employees was called by George Ellis, the President of Terex's Construction Segment[3] – a mere two (2) days before the Assembly Election.

Ellis specifically flew to Grand Rapids for the sole purpose of speaking to employees about the Assembly Election. (Tr. 122). Ellis arrived at the facility at about 1:15 PM and left within five hours the same day – June 23; he did not stay overnight as was his usual practice. (Tr. 1070, 1072). He did not speak to the paint department employees who only days before selected the Union as its representative. (Tr. 1071). Instead, Ellis held meetings with assembly employees as well as weld/fab employees. (Tr. 1071-72). These meetings were not on Ellis' calendar prior to the paint election and were not part of a previously scheduled visit. (Tr. 120). The "motivation" for him to come to Grand Rapids "was the results of the paint election" and the union being voted in. (Tr. 1071-72).

1. Employees' Testimony regarding the Ellis Meetings

Employee testimony during the hearing in this matter demonstrated Ellis stated the following during June 23 meeting:

- (Steve Peterson testimony) Ellis stated during this meeting that he has control over where business is with Terex Construction, our facility, how he can move business around, and how Grand Rapids plant could fit in another facility. (Tr. 561-62).

- (William Broking testimony) Ellis stated during this meeting that, while pointing to his chest for emphasis, he has the authority to move plants or shut them down and he makes the decision, not Jim DiBiagio or Terex's CEO, Ron Defeo. (Tr. 598). He also stated he didn't think it would be a good idea for a "third party" to represent employees. (Tr. 597).

[3] Terex's Construction Segment is headquartered in Westport, Connecticut, with approximately 200 employees on a leadership team, and with facilities and employees in numerous other locations including Germany, the United Kingdom, and India. (Tr. 1090-92).

- (Doug Lake testimony) Ellis stated during this meeting that he was the one in charge of what work went where. He had the ability to say what work came into this facility, what didn't go. He also said that he had -- that there were facilities both in Indiana and Oklahoma capable of taking care of our work load. (Tr. 619-20).

- (Justin Wiese testimony) Ellis stated during this meeting that he controls how the work force in this company goes, and that he can take this work, put it elsewhere, if needed. Ellis also stated there were other Terex companies that have closed their doors because of a union and that he would not negotiate with the Boilermakers. (Tr. 630-31).

- (Tony Knight testimony) Ellis stated during this meeting that he was the guy that could move the plant if he so wished and that he had a plant somewhere down south that could house the work that we were doing. (Tr. 925).

- (Mike Kossow testimony) Ellis stated during this meeting that the employees do not need a third party coming in here, telling Respondent how to run our plant. He also stated, while pointing at himself to his chest, that he was the one that determined what came in to our plant for work and what didn't and only he was the one that can make that decision. He also stated that there was a Terex facility in Oklahoma City that was big enough to house more projects. He also stated that Jim DiBiagio, Dallas Gravelle, Deb Schultz, and Joan Hoeschen, no matter what happened, would always have a job and did not state that about any other employees. He also stated the future of our facility depends on what takes place on the 25th. (Tr. 968-970)

- (Nick Baker testimony) Ellis stated during this meeting that he supported everything that DiBiagio had said in the prior meeting on June 19, and there would be no repercussion or anything for anything that he had said. He also stated he controlled where all the work went and there was room in an Oklahoma facility for work. And he also said that there were multiple union places in the past and there were only two left. (Tr. 994).

On rebuttal in this matter, Mr. Lake, Mr. Peterson, Mr. Wiese and Mr. Baker all refuted contentions by the Respondent that Ellis stated the facility would remain open if the union were voted in. (Tr. 2008-2011).

2. Ellis' Testimony regarding the Ellis Meetings

At the hearing in this matter, Ellis provided a present-tense version of what he alleges he stated during the meetings on June 23. Ellis testified he spoke about flexible work environments:

- "[T]he decisions you're going to make are very critical, you know, to allowing us to continue in a flexible work environment which will allow us to, you know, improve and grow the business." (Tr. 1058)

- "It's our philosophy. If you're willing to work, you know, have our core values around safety and to have our flexibility needs that we have working with us as we, you know, develop the business, we are going to work very hard to keep you employed."(Tr. 1059).

Ellis testified he spoke about his authority to decide where work would be performed:

- "I personally have the responsibility of deciding where work goes and I personally make those decisions because of that work environment." (Tr. 1060).

Ellis also testified he spoke about other unionized plants that Terex closed:

- Now conversely, I can explain to you a couple of other locations that we had in Terex that the results were much different. We had a location in Cedar Rapids, Iowa, represented by a union, didn't have quite the flexibility that we have in our other facilities. And part of my decision was as we move work around, we decided to close that facility. Similarly, in Wilmington, North Carolina, we had a cranes manufacturing facility there that was represented by a union and didn't have the flexibility that we quite were looking for, and that work now is sitting in my Oklahoma facility where we do have that flexibility.

  (Tr. 1060).

Mr. Ellis also guaranteed the employment of the entire management team "no matter what happened in the election." (Tr. 1080-81). But, with respect to the employment of rank-and-file employees, Ellis did not make the same assurances. Instead, he indicated that the employment of rank-and-file employees "would be up for negotiation." (Tr. 1081).

It is also alleged by Ellis that stated "if you vote for the Union, we will not close this facility the next day or any time in the near future." (Tr. 1063). As noted above, this is refuted by employees at the meeting.[4] Further, Ellis admitted in a subsequent letter that Respondent did

[4] Chris Norby testified for Respondent regarding the Ellis meetings, but his testimony was not credible in light of how much his testimony varied from the collective testimony of all other witnesses. Specifically, in the context of the discussion about other union facilities, Norby testified that Ellis did not discuss the "flexibility" of the facilities (as alleged by Ellis), but rather

not do a good job of communicating with the employees. His October 8, 2014 letter stated, with respect to threats "when … some team members apparently believe that they have been threatened, we obviously have not done as good a job as we should have in communicating with you." (Tr. 1106; R 3).

H. June 24 Meeting

On the eve of the Assembly Election, DiBiagio held another meeting with the Assembly employees. (GC 12). The slides were titled "Your Big Decision …. Are you with us …. or against us?" (GC 12). In his presentation, he followed up on his June 19 reprisals directed towards the paint employees indicating:

- "You have the benefit of watching to see what happens with the Paint Department. You can sit back and watch in real life what happens to [the paint] employees who vote for a union." (GC 12, p. 11; Tr. 141).

I. Interrogations and Threats by Respondents' Supervisors

The record demonstrates numerous supervisors approached, interrogated and threatened employees during the week of the Assembly Election, with a great majority of the threats taking place on the day before the election.

With respect to Respondent's Shipping, Receiving and Warehouse Supervisor, Nancy Dahlgren, employee testimony demonstrated:

- Nancy Dahlgren approached Nick Baker, asked him why he was interested in the union, and told him he should vote no for the Union because the plant that she worked at prior to her job how had got a union in there and it messed everything up and they closed down. (Tr. 565; 995).

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testified (with a great deal of uncertainty) the facilities were closed because of "I think of sales, and what was the other? Poor quality, I guess, I think I believe I said." (Tr. 1534). Norby also testified that everything blended and he was not sure whether what he testified to was said during this meeting, during a different meeting, or during the union campaign in 2012. (Tr. 1535-36).

- Nancy Dahlgren approached Bill Broking and asked him what he thought about the union and also stated "[i]f they get a union in here, you know, this place will close or move." (Tr. 601; 974).

- Nancy Dahlgren approached Doug Lake and told him "I'm 52 years old and I really don't want to have to start over. I worked other union … places … and when they came in, we had to move on." When Doug Lake informed her he had made up his mind, Dahlgren stated "[w]ell, I guess I'll move back to the Cities then." (Tr. 617).

- Nancy Dahlgren made similar comments to Miranda Clark, Greg Payne, and Doris Olson, including "Well, if you guys do vote the union in, they will close the place down and I don't want to have that go on," (Tr. 631-632), and "if the company goes union, that they are going to shut it down." (Tr. 643).

With respect to Respondent's Test Track and Development Supervisor Buck Storlie, employee testimony demonstrated:

- Buck Storlie approached Bill Broking and Mike Kossow was in hearing distance. (Tr. 563, 2012). Storlie never spoke to Broking before, but Storlie asked Broking what he thought about the union and told Broking he didn't think it would be a good idea, and that the plant would move if the union was voted in. (Tr. 600; 976).

- Buck Storlie made similar comments to Miranda Clark, Greg Payne, and Doris Olson. (Tr. 633).

With respect to Respondent's Director of Engineering and Development Bill Wake, employee testimony demonstrated he approached Broking, asked what he thought about the union, offered his opinion without solicitation, and stated if the Union came in they would shut the doors in the plant. (Tr. 599, 973, 1211). Wake also approached other employees and was bouncing from person-to-person. (Tr. 975).

With respect to Respondent's Production Control Manager Lori Gill, employee testimony demonstrated that she approached Broking and informed him if the facility had a union they would close it. (Tr. 975-976).

With respect to Respondent's Area Manager, Welding, Fabrication and Paint, Joan Hoeschen, employee testimony demonstrated she threatened an employee with unspecified retaliation because the employee voted for the Union. After the Paint Election, Esler told Hoeschen why he voted in favor of the Union. She responded with "We'll see how that works out for you" and "Good luck with that." (Tr. 693-694).

J. The Assembly Election

The Assembly Election went forward on June 25. The Union did not succeed in the Assembly Election, receiving 15 votes for and 22 votes against out of 39 ballots with two (2) challenged ballots. (GC 4).

K. Respondent Announces Permanent Layoff of Six (6) Paint Employees

On June 26, Respondent announced it would permanently layoff six (6) of the eleven (11) total employees in the paint department. (GC 1(s), ¶¶ 5(c), 8(a), (c); GC 1(w) ¶¶ 5(c), 8(a), (c)).

One (1) day after the Union was certified for the Paint Unit and eight (8) days after the Paint Election took place, on June 26, 2014, the Employer advised the Union it had unilaterally acted to implement "a permanent layoff of three (3) team members in the Paint Department," i.e., three (3) employees within the newly certified Paint Unit. (R 5). Respondent then advised employees Dale Persson, Dennis Feltus, and Jesse Schminski that they were being permanently laid-off immediately. (Tr. 410-11).

When terminating the three (3) painters, Respondent did not provide any advance notice of a possible termination. At the termination meeting, the only reason provided for the termination was it being slow and lack of orders. No mention was made of any issues with zinc. (Tr. 760-61).

Respondent also announced on June 26 that it planned to permanently layoff three (3) additional employees in the Paint Unit (for a total of six (6) layoffs), effective on or about, August 14, 2014. (R 5). The three (3) additional employees were identified and laid-off on August 14. Those paint employees were Kerry Esler, Lee Kostal and Rick Andrews. (Tr. 411).

Much like the June 26 termination meeting, no mention was made of any issues with zinc, and instead Respondent referenced business being slow. (Tr. 843-844).

L. Permanent Layoff of Seven Weld/Fab Employees

Also on June 26, Respondent permanently laid-off seven (7) employees in the weld/fab department: James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, and Rory Sisco. (GC 1(s), (w) ¶ 8(a)). At the termination meeting, the laid-off weld/fab employees were told that, because it was slow, there would be a reduction in staff. (Tr. 926).

M. Reclassification of Two Weld/Fab Employees

On July 3, Respondent reclassified welding/metal fabricating department employees Brandon Rajala and Mike Wilson to the assembly department and lowered their wage rates. (GC 1(s), (w) ¶ 8(b)). Both Rajala and Wilson continued to work in test track, with their lower wage rate, from July 3 until September 22. (GC 1 (w) ¶ 8(b)); Tr. 440)).

ARGUMENT

A. VIOLATIONS RELATED TO THE JUNE 19 DIBIAGIO MEETING

Respondent violated Section 8(a)(1) of the Act by threatening unspecified reprisals because employees chose to be represented by the Union, threatening the employees with adverse economic consequences, threatening the employees that Respondent's Grand Rapids facility could or would be closed because of employee support for the Union, and threatening the employees that Respondent had closed most of its unionized factories. (Complaint ¶¶ 7(a)-(f)).

1. Respondent, by and through actions of DiBagio, violated the Act by making threats of unspecified reprisals towards Paint Employees and Union Supporters (Complaint ¶¶ 7(a)-(c), (f)).

The Board has found that an employer violates the Act when threats of an "unspecified reprisal" are made because employees engage in union activity. *Portola Packaging, Inc.*,361 NLRB No. 147 (Dec. 16, 2014). On June 19, DiBiagio made numerous threats of unspecified reprisals both towards the paint employees and any employees that supported the Union.

As noted *supra*, DiBiagio's statements and demeanor during the June 19 meeting are undisputed. Other than a few opening comments, DiBiagio read from a presentation. His demeanor and tone were described during this meeting, immediately after the union victory in Paint, as "[r]eally red in the face," "having a heart attack," "eyes … popping out of his head," "agitated," "cussing and swearing" and "[l]oud," among others.

Given DiBiagio's undisputed demeanor and tone during the meeting DiBiagio made the following statements of unspecified reprisals *directly towards the paint department* in an aggressive and loud manner (GC 11):

- "Yesterday the paint department voted 10-1 in favor of the union. They are claiming a great victory but I am not so sure they will be happy down the road with the decision they made."

- "I think the painters made a huge mistake yesterday. Time will tell but I think they made a big mistake."

- The painters did not win "because now have taken a huge risk with their decision to be represented by the union."[5]

Also during the June 19, 2014 meeting DiBiagio made the following statements of unspecified reprisals *directly towards any union supporter* in an aggressive and loud manner (GC 11):

- "If I can't trust you, you are nothing to me;"

- "The message received is… You don't believe a thing I have been telling you and you don't give a shit about anything I have done for you."

- "…here we go pulling a dumbass move like bringing in a union"

- "Orders are plummeting, we are going to go through a rough time over the next several months and instead of pulling together to weather the storm you decide to bring in a union? Unfuckin believable."

- "Don't you see what is going on right here right now? Who in their right minds does this kind of crap anymore and expects to succeed?"

- "…it really pisses me off when I see the audacity in this room after all the company has done for you."

- "By doing all of this union crap you've thrown us back almost all the way to square one."

- "those of you who think bringing in a union is a good idea need a reality check"

[5] DiBiagio followed-up on these statements in a meeting with Assembly employees on June 24 titled "Your Big Decision …. Are you with us …. or against us?" where he referenced in a presentation:

- "You have the benefit of watching to see what happens with the Paint Department. You can sit back and watch in real life what happens to employees who vote for a union." (GC 12).

Thereafter, on June 26, Respondent followed through with DiBiagio's threats and subjected the paint employees to reprisals and retaliation for supporting the Union by announcing a mass layoff in the paint department.

On June 19, DiBiagio continually emphasized the "huge risk" taken by the paint employees and foreshadowed that they will not be "happy down the road with the decision they made." He then proceeded to indicate that paint employees and union supporters are "nothing to [him]," and voiced that there were and are consequences for this "[u]nfuckin believable" "union crap." All of these statements were made in a loud and aggressive manner.

In a recent case with much less aggressive statements, the Board found that a supervisor made a threat of unspecified reprisal when indicating he was "disappointed" in an employee's support for a union. *See Print Fulfillment Servs. LLC*, 361 NLRB No. 144 (Dec. 16, 2014). In *Print Fulfillment*, the Board specifically noted that the supervisor suggested he was "about to say something better left unsaid" and indicated "his feelings were strong enough to overcome his hesitation" before expressing his "disappointment." The Board also specifically noted that the coercive tendency of the statements were solidified when the supervisor did not continue the conversation, but instead "just turned and walk away 'red-faced'--apparently confirming his strong feelings about the matter and demonstrating that he did not wish to hear from [the employee] further." As a result, the Board concluded "the judge correctly found that a reasonable employee would interpret [the supervisor's] remark as threatening the possibility of reprisals." *Id.* at *2.

DiBiagio's statements have all the same characteristics of the circumstances referenced in *Print Fulfillment* as he suggested his statements were better left unsaid, but proceeded because of his strong feelings on the topic ("I am going way out on a limb to be straight with you right now" and "I have such a passion for this and why it really pisses me off"). DiBiagio went further than expressing mere disappointment with union supporters and painters as evidenced by his numerous statements and aggressive demeanor. Further, unlike all other meetings of this type

where conversation and questions were permitted, DiBiagio finished his statements, did not allow for any questions and left the meeting red-faced.

The decision in *Hialeah Hosp.* 343 NLRB 391 (2004) also demonstrates that respondent violated the Act. In *Hialeah Hosp.* the Board agreed with the judge that the respondent's vice president violated the Act when he made statements indicating that he felt "betrayed" at a mandatory meeting called mere hours after receiving a union's demand for recognition and a representation petition. The judge specifically found, and the Board agreed, that the vice president violated the Act "given the swiftness with which [the vice president] called the meeting, the pervasiveness of the statements, the angry manner in which they were delivered, and the fact that they were made by [the vice president], a high-level official."

Much like *Hialeah*, the June 19 meeting was a swiftly scheduled meeting – occurring mere hours after the paint employees selected the Union to be its representative. DiBiagio was also clearly in a hurry to convene this meeting as he stayed up all night preparing his statements. The meeting was an impromptu, mandatory meeting, without prior notice that took place hours after the victory in the paint election. DiBiagio's statements were also consistent with conveying the message that he had been betrayed, including his statement that "you don't give a shit about anything I have done for you."

DiBiagio's statements also convey the message of employee disloyalty. "It is well settled that statements equating union activity with disloyalty to the employer constitute coercion in violation of Section 8(a)(1) of the Act … as well as an implicit threat of repercussions for union loyalty, as opposed to company loyalty." *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996) (citations omitted). During the June 19 meeting, DiBiagio stated: "If I can't trust you, you are nothing to me." Respondent may attempt to argue that this statement reflects

DiBiagio's general views on credibility. Beside the fact that such an argument is irrelevant,[6] it is also unpersuasive in that DiBiagio almost immediately followed his statement by questioning how the union had gained the employees' trust: "Yet you want to bring in a damn union for what?? What have they done to earn your trust?" Also during this meeting, DiBiagio stated it was "unfuckin believable" the employees "decided to bring in a union" and added "The message received is… You don't believe a thing I have been telling you and you don't give a shit about anything I have done for you." (GC 11).

DiBiagio's remarks would reasonably tend to restrain and coerce employees from engaging in further union activities. Under similar circumstances, the Board has found violations of the Act. *See, e.g., Indiana Gas Co., Inc.*, 328 NLRB 623 (1999) (supervisor's statement that he could not trust union employees anymore because they revealed job-related information to their union steward would reasonably tend to restrain and coerce employees from engaging in further union activities in violation of Section 8(a)(1)). DiBiagio's consistent use of the derogatory phrase "union crap" also provides further support for finding a violation of the Act. *See MDI Commercial Servs.*, 325 NLRB 53, 54 (1997) (finding violations where a supervisor "derogatorily referred to [employees' union activities] as 'union crap,'" coupled with statements that supervisor did not trust the employees);

For the foregoing reasons and considering the Board's precedent, Respondent, by DiBiagio's aggressive and loud statements made on June 19, has violated the Act by threatening unspecific reprisals.

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[6] *Elec. Hose & Rubber Co.*, 262 NLRB 186, 191 (1982) ("The test for 'interference,' 'restraint,' or 'coercion' does not turn on the subjective impact which the inquiries may have on the individual employee. Rather, the question is whether it can be reasonably said that the employer's conduct tends to interfere with the free exercise of employee rights under the Act." (*citing Litton Dental Products Division of Litton Industrial Products, Inc.*, 221 NLRB 700 (1975)).

2. Respondent, by and through the actions of DiBiagio, violated the Act by making threats that Respondent's Grand Rapids facility could or would be closed because of employee support for the Union that Respondent had closed most of its unionized factories. (Complaint ¶¶ 7(d)-(e)).

Under *Gissel*, the analytical question is whether the remark was a threat or a "fact-based" prediction, which would be lawful as an expression of opinion. Without an objective explanation, the remark becomes an unlawful threat. *Id.* at 617-19; *Jimmy-Richard Co.*, 210 NLRB 802, 804-805 (1974), *enfd. sub nom. Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803 (D.C. Cir. 1975), *cert. denied* 426 U.S. 907 (1976).

Remembering DiBiagio's undisputed demeanor and tone during the meeting, DiBiagio made the following threats of plant closure in an aggressive and loud manner (GC 11):

- "I have had to fight for your existence each and every day to keep the wolves at bay and just when we build a little breathing room here we go pulling a dumbass move like bringing in a union[.] Our business is dropping like a rock. Orders are plummeting, we are going to go through a rough time over the next several months and instead of pulling together to weather the storm you decide to bring in a union? Unfuckin[g] believable." (GC 11 at 10).

- "Terex had multiple unionized factories, most of them are gone. . . I had to close 4 union plants in my career—UAW, UAW, Asbestos and haz waste workers, Teamsters. Unionized facilities simply struggle to remain competitive. I have had to look into the eyes of a lot of people and tell them their plant was closing. That's why I have such a passion for this and why it really pisses me off when I see the audacity in this room after all the company has done for you." (GC 11 at 11).

DiBiagio also made statements connecting the survival of the business to the Assemblers' vote and decision.

- "Do you really think a union is going to get you big pay increases? Do you really think a union is going to get you better benefits or pay less for what you are getting now? Do you really think a union is going to get you a ridiculously expensive pension plan? And I don't think this plant could survive a strike." (GC 11 at 12).

- "I hope you all are smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of the business." (GC 11 at 13).

Such statements have been found to be threatening conduction in violation of the Act. *See, e.g., Weather Tamer, Inc.*, 253 NLRB 293, 304 (1980) (unequivocal statement of fact that the employees' future employment will be affected by their unionization of the plant violates the Act).

The Board's ruling in *Atl. Marine, Inc.*, 193 NLRB 1003, 1008 (1971) *enfd.* 512 F.2d 1404 (5th Cir. 1975) *citing Gissel*, provides further support for finding DiBiagio's statements were unlawful. Here, DiBiagio read off a series of questions that all started with the phrase "Do you really think the union is going to get you …" and ended with hypothetical compensation and benefits. This series of questions was immediately followed by DiBiagio's statement that he does not "think this plant could survive a strike." The implication is clear between union demands and a strike where the plant would not "survive." (GC 11).

Nothing stated by DiBiagio could even arguably be based on objective fact. He did not reference any specific demands made by the Union for compensation and benefits. DiBiagio's reference to a strike was likewise unspecific in that it was indefinite as to when the supposed strike would occur and for how long. Under similar circumstances, the Board determined that such statements were coercive and violative of the Act:

> [A]ny expression of belief … that the economic impact of a strike on Respondents at some indefinite date in the future would be such as to require Respondents to go out of business necessarily makes certain assumptions as to Respondents' economic condition at that time and the duration of any such strike. Such assumptions would seem to constitute rank speculation rather than a prediction carefully phrased on the basis of objective fact concerning "demonstrably probable consequences" of unionization beyond Respondents' control.
>
> *Atl. Marine, Inc.*, 193 at 1008 (1971).

Likewise, the Board's ruling in in *Weather Tamer, Inc.*, 253 NLRB 293 (1980) demonstrates that Respondent violated the Act by indicating, without any objective evidence,

that unionized facilities close from struggles to be competitive. In *Weather Tamer, Inc.*, the Board found:

> [Respondent's supervisor] refers to other plant closings, which he implies were forced out of business by cheaper competition because their unionized employees forced them to sell their garments at higher prices. Heller did not provide any objective evidence to support his intimidating statements to the employees. Certainly such threats constituted a violation of Section 8(a)(1) of the Act.
>
> *Id.* at 305-06.

For the foregoing reasons and considering the Board's precedent, Respondent, by DiBiagio's aggressive and loud statements made on June 19, violated the Act by threatening plant closure because of the employees' support for the Union.

B. VIOLATIONS RELATED TO THE JUNE 23 ELLIS MEETINGS

Respondent, by and through the actions of Terex Construction President George Ellis, violated Section 8(a)(1) of the Act at separate meetings of Respondent's welding and fabrication employees and employees employed in the Assembly Unit. Ellis made numerous threats of plant closure, threatened that he decided where Respondent's work was performed, and stated that selecting the Union was futile. (Complaint ¶¶ 7(i)-(q)).

1. Respondent, by and through actions of Ellis, violated the Act by making numerous threats of plant closure, threatening that he decided where Respondent's work was performed, and stated that selecting the Union was futile. (Complaint ¶¶ 7(i)-(q)).

As discussed *supra*, under *Gissel*, the analytical question is whether the remark was a threat or a "fact-based" prediction, which would be lawful as an expression of opinion. Without an objective explanation, the remark becomes an unlawful threat. *Id.* at 617-19; *Jimmy-Richard Co.*, 210 NLRB 802, 804-805 (1974), *enfd. sub nom. Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803 (D.C. Cir. 1975), *cert. denied* 426 U.S. 907 (1976).

On June 23, Ellis made a special trip to the Grand Rapids facility to hold mandatory meetings with the employees. The circumstantial evidence was such that it could be reasonably inferred that Ellis only came to Grand Rapids as a result of the paint election results, but Ellis went further and admitted it was his "motivation" for making the trip.

a. Ellis' statements demonstrated reprisals to be taken solely on his own volition.

The Union submits that the testimony of the employees is highly credible regarding the threats of plant closure. The testifying employees consistently recounted that Ellis told employees that he had control of where the work was placed, pointing to his chest to emphasize his control over the work, and told employees that there were other Terex facilities that could take work from the Grand Rapids facility.

Ellis' testimony likewise confirmed that he made such statements. During the meeting, Ellis stated: "I personally have the responsibility of deciding where work goes and I personally make those decisions because of that work environment." Ellis also made it clear that he made the decision to close a unionized Terex facility: "And part of my decision was as we move work around, we decided to close that [unionized] facility."

Ellis' statement about the control of work provides strong support for finding threats of plant closure. His continued emphasis on it being his "decision" and "responsibility" demonstrates his statements were "threat[s] of economic reprisal to be taken solely on his own volition." *Gissel Packing Co.*, 395 U.S. at 619; *accord N. L. R. B. v. Noll Motors, Inc.*, 433 F.2d 853, 856 (8th Cir. 1970) ("employer's prediction was not carefully phrased to demonstrate probable consequences beyond his control nor to convey a management decision already arrived at to close the plant in case of unionization. It was rather phrased to predict that unionization would inevitably cause the plant to close, throwing employees out of work regardless of the

economic realities.").

b. Ellis' statements regarding plant closure and moving work were void of any objective facts.

When speaking about other unionized plants that Terex closed, Ellis offered *zero* objective facts regarding why they were closed:

> Now conversely, I can explain to you a couple of other locations that we had in Terex that the results were much different. We had a location in Cedar Rapids, Iowa, represented by a union, didn't have quite the flexibility that we have in our other facilities. And part of my decision was as we move work around, we decided to close that facility. Similarly, in Wilmington, North Carolina, we had a cranes manufacturing facility there that was represented by a union and didn't have the flexibility that we quite were looking for, and that work now is sitting in my Oklahoma facility where we do have that flexibility.
>
> (Tr. 1060).

Ellis made sure he made it clear it was *his* "decision" to move the work around and close the union facilities, and further made sure he pointed out the lack of "flexibility" led to the unionized facilities being closed. No other statements were made regarding the Cedar Rapids and Wilmington plants, according to Ellis, and zero objective facts are present.

Ellis also consistently connected the ambiguous and unexplained term "flexibility" to the survival of the Grand Rapids' facility:

- "[T]he decisions you're going to make are very critical, you know, to allowing us to continue in a flexible work environment which will allow us to, you know, improve and grow the business." (Tr. 1058)

- "It's our philosophy. If you're willing to work, you know, have our core values around safety and to have our flexibility needs that we have working with us as we, you know, develop the business, we are going to work very hard to keep you employed."(Tr. 1059).

The statements taken together demonstrate a message that the Grand Rapids facility will close if the union is voted in. Ellis made it clear that Terex will only "work very hard to keep you employed" if you remain "flexible" and non-union. On the other hand, Ellis made it clear

that if the facility is unionized, and as a result, not flexible, he may use his authority to make a decision to close a facility or move its work.

Under similar circumstances, the Board has found unlawful threats of plant closure. In *Homer D. Bronson Co.*, 349 NLRB 512 (2007), the Board found unlawful threats where the respondent's president referenced other plant closures due to their inflexibility:

> [Respondent's president] told the employees that at one time the Company had manufacturing plants in Chicago and Beacon Falls, Connecticut, but—after repeated strikes by the Steelworkers Union, which represented the employees—both plants closed and the Beacon Falls operation was relocated to its present Winsted, Connecticut site. Spencer reminded employees that "Winsted of course has always been a non-union facility." He concluded his speech by stating that the "history of [the Respondent] and unions has not been a good one," and suggested that employees ask themselves, "will this Union help us to be *responsive, flexible and competitive* as required by our customers? Or will this Union do to this new Homer Bronson what it did to the old Homer Bronson."
>
> *Id.* (emphasis added)

Taken as a whole, the Board in *Homer D. Bronson Co.* concluded that the respondent conveyed unlawful threats of adverse consequences from unionization, rather than lawful, fact-based predictions of economic consequences beyond the respondent's control. *Id*. at 3. The Board reasoned that its conclusion was proper because, in addition to the statements made, the respondent did not disclaim any prediction regarding the facility or disclaim any connection between the closed unionized facilities. *Id.*

Much like the respondent in *Homer D. Bronson Co.*, Ellis did not provide any objective or fact-based predictions, nor did he disclaim any connection between the Grand Rapids facility and the unionized facilities that Terex closed. Instead, Ellis echoed threats similar to those made by DiBiagio four (4) days earlier. He stated that the "the future of our facility depends on what

takes place on [June] 25th" – the date of the Assembly Election. (Tr. 970).[7] Further, he told the employees that their decision would be "very critical" to "allowing us to continue in a flexible work environment" while simultaneously making the connection between flexibility and non-union facilities.

c. Ellis reinforced DiBiagio's threats, provided assurances regarding management's employment, and told employees he would not negotiate with the Union

In addition to making the threats described above, Ellis made it clear that he "supported everything that [DiBiagio] had said in the prior meeting," and told employees that even if the Union were to be voted in, he would not negotiate with the Union. (Tr. 630, 994). Mr. Ellis also guaranteed the employment of the entire management team "no matter what happened in the election and indicating the employment of rank-and-file employees "would be up for negotiation."

Considering all of the credible testimony together, Respondent, by and through the statements of Ellis, conveyed unlawful threats of adverse consequences from unionization, rather than lawful, fact-based predictions of economic consequences beyond the respondent's control. *See Homer D. Bronson Co.*, 349 NLRB 512 (2007).

Respondent's violations of the Act are even more apparent when considered against the backdrop of Respondent's other violations.[8] The record demonstrates that threats came from

[7] Such statements have been found to be threatening conduction in violation of the Act. *See, e.g., Weather Tamer, Inc.*, 253 NLRB 293, 304 (1980) (unequivocal statement of fact that the employees' future employment will be affected by their unionization of the plant violates the Act).

[8] *See Reno Hilton*, 319 NLRB 1154 (1995) (finding violation when statements were read against the backdrop of other coercive conduct and unfair labor practices); *Sturgis-Newport Bus. Forms, Inc.*, 227 NLRB 1426, 1427 (1977) (In a context of an organizing campaign where numerous 8(a)(1) violations occurred, the Board has found references to other plant closures to constitute

every level of Respondent, supervisors (like Dahlgren), the Grand Rapids General Manager (DiBiagio) and a corporate executive from Terex Construction (Ellis). The evidence demonstrates a pervasive scheme was conducted to disseminate such threats through every level of management.

Respondent's allegation that Ellis stated the Grand Rapids facility would not close is not credible. The testifying employees refuted such an allegation and substantial deviations exist in the testimony from Ellis and other witnesses called by Respondent regarding the proffered reasons that other unionized facilities closed. Further, Ellis also subsequently admitted he did not do a "good job" communicating with the employees during this meeting.

Even if, *arguendo,* Ellis' testimony is somehow credited, it does not change the fact that Ellis made a threat to *move the work* performed by the Assembly employees. It is important to remember that the election at issue was focused on one of multiple departments at the Grand Rapids facility. The unit is a derivative of the Board's reinforcement of the proper standards for determining "an appropriate unit" in *Specialty Healthcare*. Considering that the unit was limited to Assembly employees, it is important to note that Ellis did not at any point state that he would not move the Assembly Unit's work. The testifying employees were consistent in their testimony – Ellis told employees that he had control of where the work was placed, pointing to his chest to emphasize his control over the work, and told employees there were other Terex facilities that could take work from the Grand Rapids facility.

For the foregoing reasons and considering the Board's precedent, Respondent, by Ellis' statements made on June 23, has violated the Act by making numerous threats of plant closure,

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threats of plant closure; *citing* *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975)).

threatening that he decided where Respondent's work was performed, and stated that he would not negotiate.

C. VIOLATIONS RELATED TO INTERROGATIONS AND THREATS BY SUPERVISORS

Respondent, by and through actions of its supervisors Nancy Dahlgren, Buck Storlie, Bill Wake and Lori Gill violated the Act by interrogating employees and/or threatening closure of the Grand Rapids facility. Complaint ¶¶ 7(g)-(h), (r)-(u).

1. Respondent, by and through actions of Dahlgren, violated the Act by interrogating employees. Complaint ¶ 7(g).

On about June 19 or 20, 2014, after the DiBiagio meeting, Respondent, by its Shipping, Receiving and Warehouse Supervisor Nancy Dahlgren, interrogated an employee about the employee's reaction to what General Manager DiBiagio stated at the meeting, and threatened the employee that Respondent would close its Grand Rapids plant if employees voted for the Union.

The applicable test for determining whether questioning of an employee constitutes unlawful interrogation is, whether under all the circumstances the questioning, at issue, would reasonably tend to coerce the employee, to whom it is directed, to feel restrained from exercising rights protected by Section 7 of the Act. *Manor Care Health Services-Easton*, 356 NLRB No. 39, 26 (2010), enfd. 661 F.3d 1130 (D.C. Cir. 2011). The test is based on the totality of the circumstances and there are no particular factors that are to be mechanically applied. *Id.* (citations omitted).

"Generally, it is unlawful for an employer to inquire as to the union sentiments of its employees." *Id. citing President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999). In *BJ's Wholesale Club*, 319 NLRB 483 (1995), the Board found an inquiry unlawful where an employee was approached at her work station in the middle of the day by the supervisor, the

supervisor initiated the conversation by directly inquiring about the employee's feelings towards the union, the supervisor elicited information concerning the employee's union sentiment, and then communicated an antiunion campaign message. *Id.* at 484.

Here, Nancy Dahlgren approached multiple employees (Baker, Broking, Lake, Clark, Payne and Olson) at their work stations and inquired about their union sentiments. She told Baker and Lake that they should vote "no." Dahlgren also, as discussed more fully below, indicated that the facility will close if the Union was voted in and she did not want to "start over." The timing of these interrogations of Assembly employees – mere days before the Assembly election – supports finding that Dahlgren's actions were unlawful. Further, Dahlgren was not a direct supervisor in Assembly, as she oversaw different departments and the evidence suggests that the conversations were not work-related.

Considering the Board's decision in *BJ's Wholesale Club*, 319 NLRB 483 (1995), Dahlgren's actions were coercive and constitute interrogation under the Act. Furthermore, an additional basis exists for finding unlawful interrogation because Dahlgren coupled her inquiries with threats of a business shutdown as more fully discussed *infra*. *See Hoffman Fuel Co*., 309 NLRB 327, 327 (1992) (Employer's questioning union supporters of their union sentiments coupled with veiled threats of a business shutdown constitutes unlawful interrogation).

2. Respondent, by and through actions of Dahlgren, Storlie, Wake, and Gill, violated the Act by threatening closure of the plant. Complaint ¶ 7(h), (r)-(u).

On about June 19, June 23 and June 24, 2014, Respondent, by its supervisors (Dahlgren, Storlie, Wake, and Gill), threatened employees individually and in separate conversations with each employee that Respondent would close its Grand Rapids plant if the assembly employees voted for the Union.

The test of whether an employer's comments violate Section 8(a)(1) of the Act is not

dependent upon the intent of the employer. Rather, the correct test is whether, from the listeners' point of view these statements constituted forbidden coercion, threats, or intimidation. *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 117-18 (1979) (citations omitted).

The record developed demonstrated that Dahlgren continually mentioned her need to retain her job, referenced her age, and indicated she would move to Minneapolis-St. Paul because the Grand Rapids facility would close. Under similar circumstances in *House of Raeford Farms, Inc.*, 308 NLRB 568 (1992), the Board found, contrary to the judge, that Respondent had violated Section 8(a)(1) where a supervisor made implicit threats that the plant would close if the employees selected the union as their bargaining representative. *Id.* at 571. The supervisor had one-on-one conversations with eight (8) to 10 employees. In each conversation, she stated: "I'm not asking you how you plan to vote," but continued, "I need my job and if the Union come, we both might be out of a job." The judge found these comments to be lawful noting that the supervisor was expressing her personal opinion. The Board disagreed and found:

> [The supervisor's] remarks clearly conveyed to employees that they might be out of a job should the Union be voted in. [The supervisor], who initiated the conversations, did not even state that she was simply expressing her personal opinion. Accordingly, nothing occurred in these conversations to indicate to employees that [the supervisor] was speaking in other than her capacity as a supervisor for the Respondent, particularly since the conversations occurred in work areas.
>
> *Id.*

In making its finding, the Board also pointed to numerous conversations where these statements were made, the closeness to the election, and the fact that there was a heated antiunion campaign. *Id.* The Board also noted "any ambiguity as to the remarks' coercive implications must be resolved against the perpetrator." *Id.; accord Kid & Shop Kwik*, 246 NLRB 106, 117-18 (1979)

(finding threat of closure where supervisor stated to employees that facility "might" be closed because of the union).

Dahlgren's statements to employees were very similar to those made by the supervisor in *House of Raeford Farms, Inc*. She connected her job and the employees' jobs to the employees' voting no to keep the plant open. Furthermore, like the supervisor in *House of Raeford Farms, Inc.*, there were numerous conversations where these statements were made within six (6) days of the Assembly election. Respondent also put on a heated antiunion campaign. To the extent Dahlgren's remarks might be construed as a prediction, it must be recalled that the test for a prediction is that it "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969). It is clear Dahlgren did not communicate any objective facts.

Statements made by Storlie, Wake and Gill are likewise threats of closure. Storlie never spoke to Broking before, but Storlie asked Broking what he thought about the union, told Broking he didn't think it would be a good idea, and that the plant would move if the union was voted in. Buck Storlie made similar comments to Miranda Clark, Greg Payne, and Doris Olson.[9] Storlie also spoke to three additional Assembly employees. (Tr. 1197). Storlie was not the supervisor of any of these employees and he initiated each conversation. (Tr. 1199-1200).

Like Storlie and Dahlgren, Wake bounced from person-to-person in the Assembly the day before the election and offered his thoughts on the Union without solicitation. Gill similarly

[9] Storlie also made statements regarding plant closure to other non-Assembly employees. Storlie stated to Brandon Rajala on multiple occasions that "Terex is not screwing around. We will move the plant." (Tr. 867; 872; 891).

made threats of closure and provided contradictory testimony at the hearing, first denying that she was out on the floor speaking to employees about the union and the vote, and later admitting that she was out on the floor talking to multiple employees prior to the election. (Tr. 1405, 1467-69).

For the foregoing reasons and considering the Board's precedent, Respondent, by and through the actions of Dahlgren, Storlie, Wake and Gill, has violated the Act by making numerous threats of plant closure in conversations with employees. The record demonstrates that numerous supervisors were in the Assembly area the day before the election, initiating conversations and threatening closure of the Grand Rapids facility.

D. VIOLATIONS RELATED TO TERMINATIONS AND PERMANENT LAYOFFS

Respondent terminated/permanently laid-off multiple employees because of their Union activities and support, and to discourage employees from engaging in these activities. Complaint ¶ 8(a), (c)-(d).

1. Respondent terminated/permanently laid-off paint department employees Dennis Feltus, Dale Persson, Jesse Schminiski, Rick Andrews, Kerry Esler and Lee Kostal because of their Union activities and support, and to discourage employees from engaging in these activities. Complaint ¶ 8(a), (c)-(d).

Section 8(a)(3) of the National Labor Relations Act (the "Act") declares that it "shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158(a)(3). An employer's motivation may be demonstrated not only by direct evidence, but by circumstantial evidence. *Ready Mixed Concrete Co., v. NLRB*, 81 F.3d 1546 (10th Cir. 1996). Furthermore, proof of an employer's specific intent to discriminate is unnecessary; the evidence may provide a presumption of intent. *Id.* In determining motivation, "factors such as the employer's knowledge of the employee's union

activities, the employer's commission of other unfair labor practices, the timing of the employer's action and the credibility of its explanation" may be considered by the trier of fact. *NLRB v. Interstate Builders Inc.,* 351 F.3d 1020 (10th Cir. 2003). Similarly, discriminatory motivation and antiunion animus may reasonably be inferred from a variety of factors, such as a respondent's expressed hostility towards unionization combined with knowledge of the employees' union activities, inconsistencies between the proffered reason for its decision and other actions of the employer, a company's deviation from past practices in implementing its alleged discriminatory decision, and the proximity in time between the employees' union activities and their discharge. *Kieft Bros., Inc.*, 355 NLRB 116, 122 (2010).

a. The decision to terminate six (6) paint department employees was based on antiunion animus.

"The General Counsel must only show that the decision to discharge or lay off was ordered to discourage union activity or retaliate against the protected conduct of some employees." *Kieft Bros., Inc.,* 355 NLRB 116, 121 (2010) (*citing Davis Supermarkets,* 306 NLRB 426 (1992)). The General Counsel need not establish that animus was the "sole" or even the "dominant" motive, but only that the adverse action was based "'in whole or in part on antiunion animus.'" *NLRB v. Hospital San Pablo, Inc.,* 207 F.3d 67, 70 (1st Cir. 2000) (emphasis added) (quoting *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 401 (1983)).

Shortly after the Assembly Election, Respondent announced the terminations of six (6) of 11 employees in the paint department. The paint department employees overwhelmingly voted in favor of the union with 10 votes for and 1 vote against.

Respondent's actions are a mass layoff of the paint department employees. Under these circumstances, it is not necessary to establish specific knowledge of each employee's union

activities. Instead, it is sufficient if Respondent suspected employee support for the union, knew of the filing of the election petition and reacted to purge itself of possible prounion supporters. *Link Mfg. Co*., 281 NLRB 294, 303 (1986). This reaction to suspected employee support for a union is "in the nature of a 'power display'" and "without regard to specific knowledge of the pro-union activities of particular employees." *Id.* (citations omitted); *see Kieft Bros., Inc.*, 355 NLRB 116, 121 (2010) (in the event of a mass layoff or discharge, the General Counsel is not required to show a correlation between each employee's union activity and the termination of his employment) (*citing Davis Supermarkets,* 306 NLRB 426 (1992)). Similarly, "[t]he General Counsel may ... prevail... under the theory that an employer ordered mass or general layoffs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some." *NLRB v. McClain of Georgia, Inc.,* 138 F.3d 1418, 1423 (11th Cir. 1998); accord *Majestic Molded Prods. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964) (mass layoff violation when significant unlawful motive exists "even if some white sheep suffer along with the black").

The timing is also of critical importance. The paint department certification was issued one (1) day before the terminations were announced. The paint election was a mere eight (8) days earlier. "Timing alone may suggest anti-union animus as a motivating factor in an employer's action." *Cell Agricultural Mfg. Co*., 311 NLRB 1228, 1232 (1993) (layoff within 48 hours of meeting). Timing in conjunction with other unfair labor practices also supports a finding of discriminatory motive. *Equitable Resources,* 307 NLRB 730, 731 (1992) (timing of layoffs some two months after organizing began and a week after election, coupled with unlawful interrogation and threats support a finding of discriminatory motive); *Kieft Bros., Inc.*, 355 NLRB 116, 122 (2010) (Affirming ALJ's 8(a)(3) finding that the General Counsel made out

a prima facie case of discriminatory motivation that has not been rebutted where "[t]he timing of the layoffs soon after the [employees] unanimously chose union representation suggests discriminatory motivation in conjunction with Respondent's stated opposition to unionization and its unprecedented mass layoff.")

There is also significant direct evidence of discriminatory motive. This includes the demeanor and threats made by DiBiagio at the June 19 meeting, including reprisals directed towards the paint employees, Deborah Schultz being brought to the Grand Rapids facility to engage in "union avoidance" (Tr. 395), and Respondent's consistent referral to the Union as a "third party."[10] Additionally, in July 2014, Respondent was visited by representatives of one of Respondent's suppliers, Custom Products. Adam Hughes, an employee of Custom Products, attended the visit and completed a memorandum after the visit. (GC 17). The memorandum reported that Respondent was "trying to get out of paint business" and further reported:

> The union has also just recently succeeded in getting their foot in the door at Terex, but only in the paint department. ***It is their goal to eliminate painting, therefore eliminating the union in the Grand Rapids plant.***
>
> (GC 17) (emphasis added).

While Mr. Hughes could not recall the exact person he heard it from,[11] he made clear he recalled hearing the statement being said. (Tr. 174). Despite having ample opportunity, Respondent did not call Rob Levitz, Todd Monroe, Travis Anttila or Clem Moger to refute that Respondent's communication that it was their goal to eliminate the Union in the Grand Rapids facility.

[10] Referring to the union as a "third party" is "a disparaging and less than fully accurate description of the role of a collective-bargaining representative." *Shaw's Supermarkets*, 289 NLRB 844, 849 (1988)

[11] Hughes testified he spoke with Rob Levitz, Todd Monroe, Travis Anttila, and Clem Moger during the July 2014 visit. (Tr. 161).

Substantial evidence demonstrates that Respondent continued to harbor discriminatory animus against the paint employees after the paint election. As noted *supra*, DiBiagio made statements of unspecified reprisals directly towards the paint department in an aggressive and loud manner and told the Assemblers they can "sit back and watch in real life what happens to employees who vote for a union." One can reasonably expect that Assemblers have "watch[ed] what happen[ed] to employees who vote for a union" – over half of the Painters have been terminated.

Respondent's discriminatory animus even continued after the Assembly Election. Starting on or about June 26, Respondent started the process of transferring a number of employees from their department or their temporary transfer to the Assembly department. In total, nine (9) employees received a transfer. (GC 14). Respondent did not offer any such transfers to employees in the paint department that were being laid-off, nor did they consider them for transfer. (Tr. 390; GC 14, 15). It is also worth noting that in July, during negotiations, the Union requested reinstatement and a temporary transfer to another department for the laid-off painters. Respondent indicated it did not have any positions open, but this was not true as they had an opening in the test track. (Tr. 802-03; 1927; CP 16). Respondent's failure to offer a transfer to any paint department employee in lieu of layoff further demonstrates its discriminatory intent. *See, e.g.*, *Volkswagen De Puerto Rico, Inc.*, 172 NLRB 2031, 2037 (1968) (finding employee discharged in violation of Section 8(a)(3) where, inter alia, employed failed to offer "transfers" to the alleged discriminatees, but offered transfers to other employees).

The fact that numerous paint employees wore pro-union T-shirts at relevant times also supports finding the burden has been met under *Wright Line*. (Tr. 676, 718).

Considering that Respondent effectuated a mass layoff of the paint department, the timing of the layoff, Respondent's other unfair labor practices, and other evidence of discriminatory motive and animus, a prima facie case has been established as the employees' union organizing activity was a motivating factor in the Respondent's decision to lay them off. *Wright Line*, 251 NLRB 1083 (1980).

b. Respondent cannot carry its burden under *Wright Line.*

Once the General Counsel establishes a prima facie case, the burden then shifts to the respondent to prove that the adverse actions were taken for a legitimate business purpose and would have occurred even in the absence of protected conduct. *Id.* To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). "[I]t is "'real' reasons," not simply "'good' reason," which must be shown." *Merrill Iron & Steel, Inc*., 335 NLRB 171, 196 (2001) (*quoting Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (7th Cir. 1991)).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The Respondent's proffered reasons for the layoff of the paint department employees cannot be harmonized with the evidence, and thus, it has failed to carry its burden.

i. The environmental action is not the real reason for the paint terminations.

Respondent's first proffered reason for the termination of 55% of the paint employees related to an environmental action and Respondent's requirements to reduce zinc levels. Respondent alleged on June 26 that that the "only economically feasible way to achieve the necessary reduction in zinc discharge is to outsource many of the parts previously painted in-house." (R 5). This assertion is patently false.

The evidence demonstrated that for years, Respondent had pursued implementation of a wastewater treatment system ("WWTS") at its Grand Rapids facility to bring Respondent into compliance with zinc levels. Estimates for costs associated with the WWTS were known since September 2012 and the Respondent consistently communicated to the MPCA (the monitoring agency) that it was taking steps to implement the WWTS. (GC 22-25; GC 30(i)-(o)). At no point did Respondent allege to the MPCA that the WWTS was not "economically feasible" as Respondent continued to take steps to implement.

It was only after the presence of the Union that the Respondent decided to abandon the WWTS. This was particularly unusual in light of the fact that Respondent had finally come up with a solution to its long-lasting zinc issues in November 2013. Respondent's environmental consultant, Travis Knisley, testified that the formula developed was ***the solution*** to Respondent's environmental problems and "***was a success***." (GC 24 Tr. 199-200).

In advancing its defense, Respondent is expected to place heavy reliance on telephone conferences it had with the MPCA on April 16 and April 30, 2014 (R 1-2), but any such reliance must be guided by Respondent's actions at that time.

On the same day as one of those calls, April 16, DiBiagio held a mandatory "all hands" meeting, acknowledged the presence of the Union, and provided assurances to employees that their jobs were safe even though Respondent was apparently looking to "farm ... out" work away from welding and paint and insource other work to compensate:

- "We're going with quick attach and we brought in another quick attach in, right? That kind of thing, so we're looking at bringing more of the small parts in and stuff that we can turn real easy, real quick that we can do a really good job at. Then the stuff that we know we're gonna be constrained and will be real major obstacles to us down the road, let's farm that out so that we can grow this business and do it in a way that we can be very successful. So, don't be worried about running out of work." (GC 53(a), p. 13)

- "Insourcing CNC work, we have CNC work that's outside right now that we could run in here. We've got two machines. We could get better machines, to buy a better machine for this tool. We gotta do what makes sense. We'll probably start bringing more of that in there. I know we're already looking at that and painting." (GC 53(a), p. 13-14)

In fact, DiBiagio assured employees in welding and paint that they were not in danger of losing their jobs and refuted any notion that they would be shutting down paint:

- "It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doing that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay?" GC 53(a), p. 12).

DiBiagio also discussed the WWTS at this meeting on April 16. (GC. 53(a) p. 2-3).

Considering these statements by DiBiagio, Respondent cannot take the position that the layoffs were caused by the "environmental compliance action" and the "only economically feasible way to achieve the necessary reduction in zinc discharge is to outsource many of the parts previously painted in-house." The reasons given for the Respondent's actions are either false or not, in fact, relied on. Even if, *arguendo,* it is found that Respondent made plans to

outsource paint work, this was not the reason for the layoff as DiBiagio confirmed that work would be insourced to offset any outsourced work. Paint employees confirmed that DiBiagio made such representations and work would be insourced to compensate for any outsourcing. (Tr. 725, 730-31, 804, 836-837). Paint employees also confirmed that small part work would not be affected by other parts coming in powder coated, and touch-up would still be needed as well. (Tr. 832).

With respect to insourcing efforts by Respondent, the record demonstrates that the Respondent abandoned any efforts to insource parts for the paint department after learning of the Union. DiBiagio testified he "put considerable effort and energy" into exploring insourcing opportunities, (Tr. 103) and announced to employees on multiple occasions their jobs would be safe because Respondent would insource products to compensate for outsourcing in paint (and welding) (Tr. 725, 730-731, 788-789). Yet, these supposed efforts yielded a total of *zero* documents, emails, correspondence and/or memos that concerned insourcing work for the paint department. (CP 9-11;[12] Tr. 1691-95). The absence of any documents regarding insourcing of work after supposed "considerable effort and energy" casts much doubt on the credibility of DiBiagio.

It is also important to note that the reasons offered for the terminations by Respondent during the termination meetings on June 26 and August 14, respectively, were limited to referencing business being slow. Respondent did not tell any of the paint employees that their termination had anything to do with zinc, discharges or pollution. To the extent Respondent attempts to deviate from the reasons proffered on the critical dates (June 26 and August 14), such

[12] The only testimony DiBiagio could provide regarding efforts to insource work demonstrate that Respondent insourced welding work to be performed by a welding robot, not an employees. (Tr. 1687; CP 10-11).

attempts should be flatly rejected. When an employer vacillates in offering a consistent explanation for its actions, an inference is warranted that the real reason for its actions is not among those asserted. *10 Ellicott Square Court Corporation,* 320 NLRB No. 57, ALJD slip op. p 13 (1996); *Robin Transportation.,* 310 NLRB 411, 417 (1993); *C.J. Rogers Transfer Inc.,* 300 NLRB 1095, 1099 (1990); *accord NLRB v. Dorothy Shamrock Coal Co.,* 833 F.2d 1263 (7th Cir. 1987) (shifting justification for discharge calls into question the Employers motivation).

Considering the foregoing, Respondent's assertions regarding the environmental action are not the "real reasons" for the terminations of over 55% of the paint department. The reasons alleged by Respondent are false and would not have taken place if the paint employees had not engaged in Union activity.

ii. The business downturn is not the real reason for the paint terminations.

The second proffered reason for the termination of the paint department employees was Respondent's alleged "downturn in orders and backlog." At the outset, the Union notes that Respondent has taken the position that six paint employee terminations are "only *partially* attributable to a downturn in business" and "[t]he larger contributing factor" was the decision to "reduce zinc discharge by outsourcing a large part of the paint department work" because the outsourcing was "permanent." (CP 14, p. 1-2). Regardless of its secondary status, the alleged downturn of business is either false or was, in fact, not relied on by Respondent in terminating the six (6) paint employees.

On June 26, Respondent alleged that "[t]he facility has suffered an overall reduction of approximately 20% in the demand for skid steer and compact track loaders for the entire 3rd quarter" and "[t]his reduction is expected to continue through the remainder of 2014." (R 5).

Respondent's assertions cannot be harmonized with its financial figures. First, it must be noted that Respondent's forecast remained steady.

	Jan '14	Feb '14	Mar '14	Apr '14	May '14	Jun '14	Jul '14
Yearly Forecast	1866	1882	1812	1843	1911	1844	1811
Exhibit	CP 5(a)	CP 5(b); GC 59(i)	CP 5(c); R 17	CP 5(d); R 18	CP 5(e); R 26	R 36	R 41

The table above shows the forecast for production of machines never varied by more than 100. Most notably, the forecast in March (1812) was almost identical to the forecast listed in July (1811). In other words, Respondent projected the same amount of machines would be produced for the year in both March and July.

Here, it is expected that Respondent will argue a reduction in its forecast necessitated its terminations; however, such argument is at odds with Respondent's historical forecast figures and practices. Of particular importance are changes in Respondent's 2014 forecast during September 2013. During this time period, Respondent's forecast for 2014 dropped off dramatically from 2,330 machines to 1,639 machines -- a drop of 691 or 29.65%. (CP6(a)-(b); GC 59(g)).

Despite this dramatic drop, no action was taken to reduce Respondent's workforce. (Tr. 1935-36). Further, this dramatic drop also resulted in the lowest projected forecast for 2014, even lower than the forecast in July 2014 where Respondent effectuated layoffs.

It is also important to note that Respondent has had a *near* 20% drop in backlog before without effectuating any layoffs.

	Jan 13	Feb 13	Mar13	Apr 13	May 13	June 13	July 13	Aug 13	Sept 13
Backlog	782	800	893	930	913	827	799	721	640
Qtr Avg.			825			890			720
% Change						7.88%			**-19.10%**

The table above, which derives its figures for Exhibit R48, demonstrates that Respondent has experienced a *near* 20% drop in backlog for during the third quarter of 2013. Again, despite this significant drop, no layoffs or reductions in force were effectuated at this time.

It is also worth noting that during a June 10 meeting, DiBiagio referenced the downturn as merely a "business cycle":

> - We've lost $36 million in the last couple of years and we just barely got ourselves in the profitability side. Now our volume's down low enough we're gonna lose money here for the next couple of months. Okay, well that's just a business cycle. We gotta work through it. At the end of the day, hopefully at the end of year we'll still be positive again. (p.22)

Similarly, DiBiagio noted that "[b]usiness ebbs and flows," that there has not been a layoff during the time DiBiagio has been at Grand Rapids, and "[w]e'll get through this." (GC 53(b), p. 29, 31). DiBiagio also provided assurances to employees that they were not in danger of losing their jobs on April 16.

As noted above, the year-end figure did not significantly vary and the forecast remained steady, Respondent had experienced significant drops before without requiring layoffs, and DiBiagio characterized the downturn as a "business cycle" that "ebbs and flows." Taken collectively, Respondent cannot meet its burden.

Throughout the course of the hearing, it became apparent that Respondent may attempt to expand upon the reasons proffered in its June 26 letter. (R 5). Such attempts should be flatly rejected. *See supra 10 Ellicott Square Court Corporation*. Beyond the fact that such attempts should be flatly rejected, there is additional evidence in the record that provides a factual basis for rejecting arguments that may be advanced by the Respondent, including the following:

Any arguments regarding profits or loss figures must also take into account that Respondent is including its legal costs associated with the Union in such figures. DiBiagio made

it clear during a June 10 meeting (before any unfair labor practices charges had been filed) that Respondent had already spent $150,000 in legal costs and those costs were, allegedly, to "not to fight anything." Certainly, it would be expected, that since this case has continued and become an adversarial action, Respondent's legal costs have only increased.

Any arguments regarding that emphasize the downturn in orders for SSLs must also take into account DiBiagio's statements on April 16. Then, DiBiagio refuted that there would be any issue with what appeared to be a decline in SSL orders, referring to it as "no big deal", and stated "it doesn't matter" whether the work needed is for CTLs and SSLs:

- "With the skid steers, it's like Takeuchi is not moving them. We're not moving them. Out there in the field is not moving at all. Really, we're (unintelligible) . . . for the most part. That's why we're thinking about getting CE and going over there right now. It's no big deal. Personally, if we make a tractor machine or skid steer it doesn't matter, as long as we've got enough to go around to everybody. (GC 53(a) p. 28).

Considering the presence of significant interchange at Respondent's facility (Tr. 135, 322, 377-78, 424) and the apparent insignificance of whether an order calls for CTLs or SSLs, any argument by Respondent that emphasizes a downturn in orders for SSLs should be largely discredited.

Considering the foregoing, Respondent's assertions regarding the business downturn are not the "real reasons" for the terminations of over 55% of the paint department. The reasons alleged by Respondent are false and would not have taken place if the paint employees had not engaged in Union activity.

2. Respondent terminated/permanently laid-off welding/metal fabricating department employees James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, and Rory Sisco because of their Union activities and support, and to discourage employees from engaging in these activities. Complaint ¶ 8(a), (d).

"The General Counsel must only show that the decision to discharge or lay off was

ordered to discourage union activity or retaliate against the protected conduct of some employees." *Kieft Bros., Inc.,* 355 NLRB 116, 121 (2010). The evidence demonstrates laying off some employees in weld/fab would rid it of union supporters like Tony Knight and Mike Kossow. Both Knight and Kossow went to the first union meeting and continued to attend meetings. Kossow solicited numerous authorization cards. (Tr. 915-16, 934, 964). Knight was also involved in the 2012 union campaign. (Tr. 928). Further, the fact that Ellis held a meeting specifically with the weld/fab group provides additional support for finding that Respondent sought to stamp out any union activity in weld/fab.

The record reflects that the rest of the laid off workers were not open Union supporters. With respect to those employees, as more fully discussed *supra,* the General Counsel may prevail under the theory that an employer ordered mass or general layoffs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some. Discriminatory animus is also abundantly present and is amply proven Respondent's numerous unfair labor practices discussed throughout. Additional discriminatory animus exists in the record.

With respect to Knight, he was a 17-year employee who only worked in welding. He built prototype machines for Respondent and had excellent performance reviews in 2010 and 2012 that indicated he was capable of performing any welding task. (Tr. 898, 906; GC 52). Despite this successful history, Knight was selected for layoff by Hoeschen who never performed a performance evaluation of Knight, and who went out of her way to rate Knight as a "2" or "3" on tasks, knowing very well he was capable of a rating of "4" meaning he could train others on the task. (Tr. 329-332, 338, 340-341; R 66). Hoeschen also indicated that seniority was not a factor in assessing layoffs. This was in direct conflict with the applicable handbook.

(Tr. 346, 1673-74). Moreover, Knight was an excellent employee as he was never late to work in 17 years and was never disciplined. (Tr. 917). Schultz even admitted that it was against conventional wisdom to terminate welders (instead of transferring them) because Respondent consistently faced challenges in finding welders to hire. (Tr. 425-426).

Respondent's reliance on Hoeschen's cross-training spreadsheet (GC 14) is highly suspect for a number of reasons. The only fair reading of the spreadsheet suggests that 16 employees would be laid-off under the "RIF Positions" column (the actual total was 7). George Ellis "approved" of the reduction in force without even knowing how many employees would be laid-off. (GC 13). The entire spreadsheet is also heavily based on subjective observations by Ms. Hoeschen and there is ample evidence of Ms. Hoeshen's union animus in the record. Rory Sisco was somehow reviewed on this spreadsheet despite not working in weld/fab since November 2013. (GC 98). Likewise, Ryan DeBock and Mike Kossow (and Brandon Rajala and Mike Willson) were somehow reviewed on this spreadsheet despite not working in web/fab since February 2014. (GC 98). The spreadsheet also contains inaccuracies in that Tony Knight and Mike Kossow both testified they performed additional welding tasks that they were not scored on. (Tr. 908-909, 959-961). Additionally, Respondent elected to hire a temporary worker to a full-time position in Assembly after laying off Mike Kossow. (Tr. 423).

Considering that Respondent effectuated a layoff in weld/fab, the timing of the layoff, the union activities of certain weld/fab employees and their works records, Respondent's other unfair labor practices, and other evidence of discriminatory motive and animus, a prima facie case has been established as the employees' union organizing activity was a motivating factor in the Respondent's decision to lay them off. *Wright Line*, 251 NLRB 1083 (1980). Respondent still cannot meet its burden for the same reasons stated *supra*.

3. Respondent selected Lee Kostal, Mike Kossow, Kerry Esler and Tony Knight for termination/permanent layoff because of their Union activities and support, and to discourage employees from engaging in these activities.

Under *Wright Line*, a violation of Section 8(a)(3) is established here if the General Counsel shows that the employees' union activity was a motivating factor in Respondent's selection of them for layoff, unless the Respondent proves, as an affirmative defense, that it would have made the same selections even in the absence of their union activity. *Bruce Packing Co., Inc.*, 357 NLRB No. 93 (Sept. 28, 2011).

Much of the basis for the unlawful selection of Kostal, Kossow, Esler and Knight is provided *supra*, but additional evidence in support of the violation is demonstrated below.

With respect to Lee Kostal, his union activity was well-known. Respondent was specifically aware that Kostal would wear pro-union shirts. (Tr. 454). Kostal wore his union shirt more than once, including prior to the day before the election. (Tr. 826). For the Union's 2014 campaign, Mr. Kostal was an election observer, a bargaining committee member and gained authorization cards for the paint department. (Tr. 824). Mr. Kostal also appeared at the NLRB Minnesota Regional Office as a prospective witness regarding the paint department in May 2014. (Tr. 825). Mr. Kostal was also the observer in the election for the International Operating Engineers in 2012. (Tr. 826). Kostal was also considered to be a "go-to" employee in the paint department. (Tr. 668-669).

As was well-documented at the hearing, Respondent relied on a cross-training spreadsheet to terminate paint employees, including Lee Kostal. Respondent wanted the determination for layoffs to be determined prior to the paint election and there was a sense of urgency to complete the spreadsheet. (Tr. 414).

One version of the spreadsheet actually projected that Kostal *would not* be laid off. (Tr. 412; GC15(c)). The spreadsheet was ultimately not relied on as seniority was taken out of the equation. Removing seniority from the equation was, however, in direct conflict with the terms of the applicable handbook. (Tr. 346, 1673-74).

The rankings on the final spreadsheet were also called into question by the employees. Most notably, Hoeschen did not observe Kostal performing work in the small booth, the big booth, or the sanding booth, nor did she speak to Kostal about his performance. Despite the lack of observation and consultation, Hoeschen assessed Kostal subjective ratings that ultimately resulted in his layoff. (Tr. 819-820).

With respect to Mr. Esler, he worked for Respondent for 17 years with 12 of those years as a lead. He was never late for 17 years and only called in sick once. (Tr. 647, 653). Esler performed lead functions in the department and was never criticized or reprimanded for not regularly performing the paint work. (Tr. 659). Esler confirmed that Hoeschen had no or very little presence in the paint department and did not observe the work other than, e.g., walking by and glancing over. (Tr. 660-663). This very much called into question the ratings provided on the cross-training spreadsheet. (GC 15). Esler also questioned the rankings and stated that they do not accurately reflect the paint employees' skills. He noted that Lee Gustafson only painted one time in a booth for one day. (Tr. 664-665). He noted that Danny Curtiss washed "pretty much the whole time" and rarely performed any painting. (Tr. 665-666). Esler also noted Rick Andrews and Lee Kostal were more skilled painters than Steve Kruk. (Tr. 668-669).

Esler was also directly threated by Hoeschen. Esler told Hoeschen why he voted in favor of the union. She responded with "We'll see how that works out for you" and "Good luck with that." (Tr. 693-694).

Collectively, the evidence demonstrates Lee Kostal, Mike Kossow, Kerry Esler and Tony Knight for termination/permanent layoff because of their Union activities and support, and to discourage employees from engaging in these activities.

E. THE UNION'S OBJECTIONS

Pursuant to the *Report on Objections, Order Directing Hearing on Objections and Order Consolidating Cases* issued on October 8 (GC 1(o)) three (3) objections filed by the Union were consolidated with the hearing on the unfair labor practice charges. The conduct alleged in these objections includes interrogation of employees, threats of plant closure and other coercive statements made in captive audience meetings, as well as, in direct communication between the Employer and employees. (GC 1(o)).

1. During the critical period, Respondent engaged in illegal interrogation of the employees. (Objection 1).

The Union incorporates herein its arguments and authorities *supra*. The Union's arguments are coextensive with the Complaint with respect to Nancy Dahlgren's interrogation on June 19. The Objections argues additional interrogations as noted *supra.*

2. During the critical period, Respondent illegally threatened to close the plant if the Union was successful in the representation election and made other unlawful threats using intimidating and profane language. (Objection 3).

The Union incorporates herein its arguments and authorities *supra*.

3. During the critical period, Respondent made statements indicating an anti-union animus. (Objection 8).

With respect to statements of animus, disparagement of a union becomes unlawful when accompanied by other coercive statements. *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). As noted herein, it is disparaging and derogatory to refer to the union as a "third party." *Shaw's*

Supermarkets, 289 NLRB 844, 849 (1988). Further, the statement "union crap" is likewise derogatory. *MDI Commercial Servs.*, 325 NLRB 53, 54 (1997). Considering that these statements were accompanied other coercive statements, including those made by DiBiagio and Ellis as described above, such statements are objectionable.

F. RESPONDENT'S DEFENSES ARE MERITLESS

Respondent's reliance on *Independence Stave* is misguided as the severance agreements do not satisfy the criteria for deferral. Further, the Authorization Cards are reliable rendering Respondent's defense meritless.

1. The Severance Agreements do not satisfy the criteria of *Independent Stave* for deferral.

After completing its terminations, severance agreements[13] were given directly to terminated employees by Respondent. For the reasons stated herein, the severance agreements do not meet the requisite criteria for deferral under *Independent Stave.*

The validity of the waiver and release agreements such as those in this case is evaluated in the same manner as private non-Board settlement agreements. *Webco Industries*, 334 NLRB 608 (2001); *Hughes Christensen Co.*, 317 NLRB 633 (1995). In *Independent Stave*, 287 NLRB 740, 743 (1987), the Board listed the following factors to guide the Board in determining whether to give effect to a non-Board settlement: (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the

[13] The severance agreements were produced as R 4 and R 68. A summary of the severance agreements appears in Appendix A, attached hereto.

stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

With respect to the first factor, the Union did not agree to and is not a party to any of the severance agreements. The Union presumes the General Counsel opposes the agreements and such opposition should be given considerable weight. *Frontier Foundries*, 312 NLRB 73, 74 (1993) (giving considerable weight to the General Counsel's adamant opposition to settlement). The first factor weighs against deferral.

The second factor also weighs against deferral. In *Hughes Christensen*, the second factor weighed in favor of deferral because the unfair labor practice charges had been dismissed at the time the discriminatees entered into the waiver and release agreement, so at that time there was a relatively low probability that the discriminatees would prevail on their claims. *Id.* at 634.

Multiple cases have distinguished *Hughes Christensen* on this ground. In *Weldun Int'l, Inc.*, 321 NLRB 733, 738, fn. 6 (1996), the Board distinguished *Hughes Christensen* because the settlement agreements pre-dated the issuance of a complaint. Similarly, in *Clark Distribution Sys., Inc.*, 336 NLRB 747, 750-51 (2001), the Board distinguished *Hughes Christensen* because the unfair labor practice case was still in the investigative stage when the settlement agreement was signed.

Here, like *Weldun Int'l, Inc.* and *Clark Distribution*, the severance agreements were signed prior to the issuance of the Complaint on September 26, 2014 and/or signed during the investigative stage of this matter. (Appendix A). Also, much like *Clark Distribution*, the severance agreements should not be enforced because they contained broad confidentiality and

non-disparagement clauses[14] that potentially prevent an employee assisting another with a Board investigation. *Id.* at 748. It is also worth noting that individuals were not in a position to assess litigation risks because they were not the charging party (the Union was), and Respondent refused to produce any documents or information regarding the terminations/layoffs because of the pendency of the charges in this matter. (R 6, R 8). For the foregoing reasons, the second factor weighs against deferral.

The third factor also weighs against deferral because of the broad confidentiality and non-disparagement clauses contained in the agreements.

Considering these factors, the *Independent Stave* criteria have not been satisfied and the severance agreements should not be deferred to.

2. The Authorization Cards are reliable.

Under the *Cumberland Shoe* doctrine, unambiguous authorization cards are valid unless employees are told that the sole purpose of the card is to secure an election. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969). The authorization cards unambiguously authorize the BB as the signer's collective bargaining representative. The Union's authorization card is titled "Authorization for Representation" and states "I, the undersigned employee of _____, hereby select the above-named union as my collective bargaining representative." (GC 45). The record does not demonstrate any instances where employees were told the *sole* purpose of the card is to secure an election. This defense is meritless.

[14] *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48 (Feb. 21, 2014) ("by requiring employees to abide by the unlawfully broad confidentiality and nondisparagement clauses as conditions for receiving severance pay, Respondent violated Section 8(a)(1) of the Act.") (*citing DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip op. 3 (2013); *Clarement Resort & Spa*, 344 NLRB 832 (2005)).

CONCLUSION

For all of the foregoing reasons, as well as the reasons and arguments set forth by the General Counsel which are hereby adopted and incorporated by reference, the Union prays the Judge find that Respondent violated the Act as alleged in the Complaint (including all amendments thereto), find Respondent engaged in objectionable conduct, and order an appropriate remedy, including but not limited to return of work to the paint department, an appropriate bargaining order, reinstatement, making employees whole for all losses with interest, a cease and desist order and posting a notice which the Judge should order to be read aloud by an agent of the NLRB at a mandatory meeting of all appropriate employees, and all other relief and remedies sought by the General Counsel

Dated: January 30, 2015

Respectfully submitted,

/s/ Jason R. McClitis
Jason R. McClitis
Blake & Uhlig, P.A.
753 State Avenue
475 New Brotherhood Building
Kansas City, Kansas 66101
Telephone: (913) 321-8884

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 30th day of January 2015 the *Charging Party International Brotherhood Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, And Helpers, AFL-CIO's Post-Hearing Brief* was e-filed with the NLRB Division of Judges, was served (3 copies) on David I. Goldman, Administrative Law Judge via email and UPS next day delivery at the following address:

David I. Goldman
Administrative Law Judge
NLRB Division of Judges
1099 14th Street, NW, Room 5400 East
Washington, DC 20570-0001
E: david.goldman@nlrb.gov

and was served on the following persons, by electronic mail and UPS next day delivery:

Florence I. Brammer, Attorney
Tyler Wiese, Attorney
National Labor Relations Board
Region 18
330 Second Ave. South, Ste. 790
Minneapolis, MN 55401
E: Florence.Brammer@nlrb.gov
E: tyler.wiese@nlrb.gov

Charles Roberts
Partner
Constangy, Brooks & Smith,
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101-4016
E-mail: CRoberts@constangy.com

s/ Jason R. McClitis

Appendix A:

Name	Department	Termination Date	Employee Signed	Consideration Period	Consideration Expires	Revoke Period	Revoke Date
Dennis Feltus	Paint	6/26/2014	7/22/2014	45 days	8/10/2014	7 days	7/29/2014
Dale Persson	Paint	6/26/2014	No agreement				
Jesse Schminiski	Paint	6/26/2014	7/2/2014	10 days	7/6/2014	None	None
James Baldinger	Weld/fab	6/26/2014	6/27/2014	45 days	8/10/2014	7 days	7/4/2014
James Baldinger (second agreement)	Weld/fab	6/26/2014	7/18/2014	45 days	8/10/2014	7 days	7/25/2014
Vicky Burton	Weld/fab	6/26/2014	6/26/2014	45 days	8/10/2014	7 days	7/3/2014
Vicky Burton (second agreement)	Weld/fab	6/26/2014	7/18/2014	45 days	8/10/2014	7 days	7/25/2014
Ryan DeBock	Weld/fab	6/26/2014	6/26/2014	10 days	7/6/2014	None	None
Tony Erickson	Weld/fab	6/26/2014	6/30/2014	45 days	8/10/2014	7 days	7/7/2014
Tony Erickson (second agreement)	Weld/fab	6/26/2014	7/18/2014	45 days	8/10/2014	7 days	7/25/2014
Tony Knight	Weld/fab	6/26/2014	No agreement				
Mike Kossow	Weld/fab	6/26/2014	8/12/2014	45 days	8/10/2014	7 days	8/19/2014
Rory Sisco	Weld/fab	6/26/2014	6/27/2014	45 days	8/10/2014	7 days	7/4/2014
Rory Sisco (second agreement)	Weld/fab	6/26/2014	7/18/2014	45 days	8/10/2014	7 days	7/25/2014
Rick Andrews	Paint	8/14/2014	8/28/2014	45 days	9/27/2014	15 days	9/12/2014
Kerry Esler	Paint	8/14/2014	8/18/2014	45 days	9/27/2014	15 days	9/2/2014
Lee Kostal	Paint	8/14/2014	8/20/2014	45 days	9/27/2014	7 days	8/27/2014